HARVARD LAW REVIEW.

Published monthly, during the Academic Year, by Harvard Law Students.

SUBSCRIPTION PRICE, $2.50 PER ANNUM. . . . . 35 CENTS PER NUMBER.

IN the present number we print an essay by Mr. Everett V. Abbot of the third-year class of 1889. This is the essay to which was awarded the prize of one hundred dollars offered by the Harvard Law School Association.

THE Council of the Harvard Law School Association submits the following report of membership on December 1, 1889. The whole number of members of the Association is 901, representing 38 States and Territories, and distributed as follows: —

Alabama,	3	Maine,	12	Rhode Island,	9
Arkansas,	1	Maryland,	8	Tennessee,	2
California,	15	Massachusetts,	467	Texas,	5
Colorado,	13	Michigan,	11	Vermont,	2
Connecticut,	9	Minnesota,	12	Virginia,	2
Dakota,	3	Mississippi,	1	Washington,	1
Delaware,	4	Missouri,	22	West Virginia,	2
Dist. Columbia,	19	Montana,	2	Wisconsin,	7
Georgia,	3	Nebraska,	1	New Brunswick,	12
Illinois,	27	New Hampshire,	9	Nova Scotia,	6
Indiana,	4	New Jersey,	3	U. S. of Colombia,	1
Iowa,	4	New York,	119	France,	1
Kansas,	1	Ohio,	51	Austria,	1
Kentucky,	6	Oregon,	1	Japan,	2
Louisiana,	1	Pennsylvania,	16		
					901

The membership roll comprises the names of more than one-fourth of the whole number (3,218) of former students of the Harvard Law School known to be living, and includes representatives from the classes of 1829, 1831, 1833, 1835, and from every class from 1838 to the present time.

Since October 15, 1889, there has been an increase in the membership of 53.

MR. P. EDWARD DOVE in the second edition of his pamphlet, "Public Rights in Navigable Rivers," takes occasion to answer some criticisms which were made upon the first appearance of this monograph and to reiterate his proposition with force and clearness. The pamphlet was called forth by two English decisions [1] in which it was held that the public had no right of fishing in non-tidal waters though such waters might be navigable. Mr. Dove's purpose is to show that the present course of decisions in England relative to public rights in navigable rivers is not in accord with the early English law. By a very careful examination of the Hundred Rolls and the Year Books he shows that formerly "every river that was in fact navigable for ships or boats was a public river and a highway," and his conclusion is that as the public has the right of way it has necessarily the right of fishing, that the two rights, in other words, are concurrent and coexistent. That these two rights do exist together in the case of tidal waters in both England and the United States, and that they usually so exist in the case of non-tidal and navigable waters in the United States is unquestionably true, but must they *necessarily* exist together? For instance in many of our states there is a public right of way over streams which can only be used for the floating of logs, but would it not be going pretty far to say that because a man can drive his logs down a certain stream at the time of the spring freshets he has the right to fish for trout in that stream? In an elaborate judgment of the Special Commissioners for English Fisheries [2] this point is considered, and the following extract is quoted from that judgment: —

"In some rivers there are five to thirty miles of this navigable water which are not tidal, and in all that portion of the river the rule is that the public have the right of passage in boats and vessels, but have no right to catch fish. While navigating this part of the river, the public have no more right to dip a net or cast a fly than a passenger along the highway has a right to catch the game or dig the mines there. . . . The public right of navigation and the public right of fishing are entirely separate rights. They are not concurrent rights, except in the sea and tidal parts of the river; and even there it is well settled that, if the rights clash, the fisherman must give way for the navigator, the right of navigation being the paramount right."

We must doubt, therefore, on principle and on authority the correctness of Mr. Dove's inference.

PROPRIETORS of patent medicines will find in a very recent decision of the Supreme Court of Georgia, *Blood Balm Co. v. Cooper*,[3] matter for serious consideration. It is there decided that when a patent medicine is put on the market and accompanied by directions for its use, and it is shown to contain poisonous matter enough to injure a person who takes the dose as directed, the proprietor is liable for the injury. The opinion states that the court has been unable to find any reported case in which this point arose, but the conclusion is reached on principle, that the defendant is liable. The company relied on the fact that they had had no dealings with the plaintiff, who had purchased the "Balm" from a druggist; but the defence was unsuccessful, as it

[1] Murphy v. Ryan, 2 Ir. R. C. L., 143; Pearce v. Scotcher, 9 Q. B. D. 162.
[2] Annexed to Leconfield v. Lonsdale, L. R. 5 C. P. 657, 665. [3] 10 S. E. Rep. 118.

was pointed out by the court that the liability did not arise by contract, and that the circumstances of this case, where a medicine was prepared for public sale, distinguished it from the case where a gun or dangerous machine is sold to one person and by him delivered to another.

THE recent refusal of the judges of the Supreme Court of Massachusetts[1] to answer the questions of the House of Representatives is worthy of notice. The constitution of this state[2] contains the following clause; "Each branch of the legislature, as well as the governor and council, shall have authority to require the opinions of the justices of the supreme judicial court upon important questions of law and upon solemn occasions;" and in accordance with this clause the opinion of the justices has frequently been asked, the court always recognizing — what the daily press is apt to forget — that such opinions are of a merely advisory character and do not have the force of decisions. On a previous occasion[3] the court declined to answer questions, on the ground that they related to matters of judicial administration not subject to legislative or executive control. The ground for their refusal in the recent case — where the question related to the interpretation of a statute in regard to the means of education which a parent is required to provide for his child[4] — is substantially that there was no "important question of law" or "solemn occasion" within the meaning of the constitution. The judges seem inclined to limit the application of the clause to cases in which the branch of the government requiring the opinion is in doubt as to the extent of its power and authority and wishes to be enlightened on the subject; at any rate they do not regard the question before them, though "propounded with a view to further legislation," as coming within "a reasonable construction of the constitution."

The provision in our constitution for requiring the opinions of the justices was evidently derived, as has been pointed out,[5] from the practice in England by which the king, as well as the House of Lords, had the right to call for the opinions of the judges. Provisions similar to, and suggested by, those of the Massachusetts constitution have appeared in the constitutions of some other states;[6] in one of these the extraordinary statement has been made by the court that its opinion had the binding force of a decision.[7] In Missouri, under a clause of this kind in the constitution of 1865, the judges repeatedly refused to give their opinions, and after ten years were relieved from the duty. In Colorado, also, a provision for requiring the opinion of the *court* was a few years ago introduced into the constitution;[8] but the legislature seems to have turned in on the judges so many and so various interrogatories

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[1] Answer of the Justices, 148 Mass. 623.
[2] Const. Mass., Part ii., ch. 3, art. 2.
[3] 122 Mass. 600.
[4] The American Law Review, Vol. 23, p. 664, seems to be under a misapprehension in supposing that the questions in this case had anything to do with "testing the constitutionality of laws in advance." The language of the court indicates that such a question might receive a different treatment; they expressly say (148 Mass. 625-6) that it is a "solemn occasion" when either branch of the legislature have "serious doubts as to their power and authority" in regard to intended action.
[5] 126 Mass. at p. 561.
[6] See a "Memorandum on the Effect of Opinions Given by Judges," by Professor Thayer. Such a provision is to be found in the constitution of the new state of South Dakota.
[7] 70 Me. at 583.
[8] Const. Col., Art. 6, Sec. 2.

that they have recently protested against the too extensive use of the power, and emphasized their protest by refusing to answer the particular question proposed.[1] This court also, but for peculiar reasons, seems to claim a judicial quality for these opinions.

The court has undoubtedly the right to decline answering an inquiry which is obviously and beyond question not within the terms of the constitution; but subject only to this qualification it would seem that the importance of the question and the solemnity of the occasion are points which the constitution has left for the legislature to decide. In view of this fact and of the great consideration which may well be expected in the dealings between the highest legislative and judicial tribunals, it may be a question whether the recent action of the Supreme Court was not somewhat strong. At any rate the House of Representatives seems to have acted properly in putting on record its dissent from the conclusions of the justices.

In the *Nation* of September 12th there is a communication on "English Woman-Burning" in which the writer mentions an instance of that punishment in a case of petty treason in 1775. The item was taken from the *Yorkshire Notes and Queries*, and the editor of that journal speaks of the occurrence as "the last case of burning to death probably." But Mr. Pike, in his very valuable History of Crime,[2] mentions two later instances, the last case being that of a woman who was burned as late as 1784 for the murder of her husband. Not long after this time the punishment of hanging was substituted by statute for that of burning.

This horrible punishment is brought nearer home when we recall the fact that in 1755 an old negro woman was burned in this city on the common opposite the college for poisoning her master.[3]

In the recent English case of *Gardner v. Bygrave*, which was an action of assault and battery brought by a pupil against his school-master for caning him on the hand, Mr. Justice Mathew made a joke which the Saturday Review regards as a "shining instance of how the tedium of legal proceedings may be profitably relieved, and the principles of law aptly illustrated by a really ready and witty observation." It was admitted on all hands that assuming caning on the hands to be a proper mode of punishment, the caning in question was a good and lawful one. The plaintiff's counsel, in an argument of a distinctly *à posteriori* character, contended that the lawfulness of caning on the hand depended on the occupation of the boy when out of school, and that the defendant ought to have inquired into the plaintiff's employment. "If he worked with his hands, such a punishment might seriously interfere with his occupation. Punishment might be inflicted elsewhere" — whereupon the court asked, — "what if his occupation were sedentary?"

It was ultimately decided that caning on the hand, when properly done and for a proper reason, is lawful.

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[1] 21 Pac. Rep. 478.
[2] II., 379.
[3] See a pamphlet entitled "The Trial and Execution of Mark and Phillis," by A. E. Goodell, Jr., published at the University Press in 1883.